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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERNAT KUPFERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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31 pp

QUESTIONS PRESENTED

1. Whether petitioner's plea of guilty was voluntary?

2. Whether a plea of guilty by a defendant, predicated upon misinformation given to him by his own counsel, constitutes a denial of the Sixth Amendment right to the effective assistance of counsel and, therefore, requires the vacating of the plea?

3. Whether petitioner's articulation prior to sentence in open court, to the Trial Judge, that he was innocent and did not intend to plead guilty, required the Trial Judge to vacate the plea of guilty?

4. Whether petitioner's confusion and equivocal answers during the allocution prior to plea requires vacating of that plea?

5. Whether the plea of guilty should be vacated, in view of the prosecutor's failure to supply his promised list of creditors claiming restitution, upon which promise the plea was, in part, predicated?

6. Whether the petitioner was denied a speedy trial (Amendments V, VI and XIV, U.S. Const.)?

PARTIES

The parties in the Court below were the same as herein.

In the Trial Court, however, one Ferdinand Landau was a co-defendant.

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OPINION BELOW

No opinion was written by the Court below, but a copy of its decision is annexed hereto as an appendix.

The Court of Appeals denied leave to appeal, and the certificate denying leave to appeal is also attached as an appendix.

JURISDICTION

A. The judgment of the Supreme Court of the State of New York, County of Kings, rendered the 24th day of September, 1982, convicted the defendant – petitioner, upon his plea of guilty to the crime of falsifying business records in the first degree,

before Honorable Dominic Lodato. A motion to withdraw the plea of guilty, and a hearing on that motion was held, but the Trial Court refused to permit withdrawal of the plea of guilty.

The indictment had contained 124 counts, and the trial actually commenced and proceeded for about three weeks before both petitioner and his co-defendant, Ferdinand Landau, pleaded guilty.

The indictment revolved around certain alleged real estate transactions and the like.

The petitioner herein maintained that he did not plead guilty voluntarily; that he was cajoled and pressured by his former attorney; and that he was completely innocent of the charges and wanted to take back his plea of guilty and go to trial.

B. The petitioner applied for leave to appeal to the Court of Appeals, but an order denying leave to appeal was made on the 1st day of June, 1984, which is annexed hereto.

The order of the Appellate Division Second Department, affirming the judgment of conviction and denying relief to the petitioner was dated the 9th day of April, 1984, and is also annexed hereto.

C. Jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

STATEMENT OF THE CASE

The Grand Jury of Kings County, State of New York, indicted Bernat Kupferstein, the petitioner herein, and Rabbi Ferdinand Landau, a co-defendant, on 124 count indictment jointly charging them with the crimes of forgery in the first and second degree (22 counts); grand larceny in the second degree (79 counts); falsifying business records in the first degree (5 counts); and violations of the General Business Law Section 352(e)(8), a misdemeanor (18 counts).

The alleged activity encompassed by the indictment concerned more than 25 complex real-estate syndications which occurred over a period of about twenty years.

It should be noted that the position of Bernat Kupferstein was that of an employee, and not as a principal, with Ferdinand Landau. Kupferstein maintained that he was merely a person taking orders from a superior and that he was not really involved in the case. Throughout the proceedings, according to the testimony of his own trial lawyer, Murray Cutler, Esq., the petitioner constantly and consistently maintained his complete innocence.

There came a time, however, after three week of trial in a case that looked like it would perhaps encompass several more months, both defendants, which of course included the petitioner herein, pleaded guilty.

Very shortly after the plea of guilty however, Bernat Kupferstein moved, through new counsel, to withdraw his plea of guilty, and asked to go to trial. Among the various grounds urged by Kupferstein when seeking to withdraw his plea of guilty, was that he was (1) innocent of the charges; (2) he was coerced, cajoled and intimidated into pleading guilty by his own counsel; (3) he was upset, confused and nervous and did not know what he was doing and that he simply followed his then attorney's advice.

The minutes of the proceedings also reveal that the prosecution had promised to supply a list of creditors who were making claims for restitution against the petitioner, so that he could evaluate the veracity of their claims. That list, although part of the plea bargain, has never been forthcoming. Instead, the prosecution has indicated that there were multiple files in the District Attorney's office which the defendant-petitioner could peruse and try to figure out who the claimants actually were.

We maintain that sifting through voluminous files, in the hope that a defendant will unearth what he believes to be pertinent material, is not the same thing as supplying a list, as the plea bargain contemplated.

As a matter of fact, Murray Cutler, Esq., his attorney at trial, conceded that at all times the petitioner was reluctant to plead guilty (59)*.

Furthermore, the defendant, who is a man who is up in years and is not a native of this country, seemed to be totally exhausted. As a matter of fact, his attorney testified at the hearing seeking the withdrawal of the plea of guilty, that the defendant (petitioner) seemed "worn out" and also seemed to be very much "in a state of fear" (62; A372).

Mr. Cutler further declared that the defendant clearly seemed "confused" when he pleaded guilty.

In his affidavit in support of the motion to withdraw that plea of guilty, the petitioner maintained that he was innocent of all the crimes charged, and that he did not want to plead guilty, but was cajoled and frightened into doing so by his then attorney.

Furthermore, Kupferstein swears in his affidavit that he was prepared to take the witness stand and that he was fully ready to go through the entire trial.

In his affidavit, the defendant-petitioner asserts, inter alia, that he did not want to plead guilty because he did not believe he was guilty then, nor does he believe that he is guilty now. He maintains, and persists, in his protestations of complete innocence.

Kupferstein alleges that it was because of confusion and cajoling from his attorney, Murray Cutler, Esq., that he finally pleaded guilty, although it was never his desire to do so.

In his affidavit in support of his motion to withdraw his plea, which was done substantially before the sentence date was set, among other things, petitioner Kupferstein alleged (A-89ff):

> "I know that I never had any criminal intent, nor was it ever my desire to commit any crime. Furthermore, I contend that I did not knowingly or willfully

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* Numerals in parentheses refer to pages of the official court reporter's minutes of trial, except where the prefix "A" is used, and in that instance they refer to the Appendix used in the Court below.

do anything wrong, especially because of the fact that Mr. Landau was really the creator and operator of this entire business and I only performed ministerial functions.

"In addition, I could not even afford to meet the terms set forth in the plea of guilty because they are totally unrealistic.

"I regret to say that my former attorney, Mr. Cutler, so confused me and created such panic in my mind, that I frankly went along with his suggestion that I plead guilty, although in my heart that was never my desire.

"The Court will not that even while I was being questioned about whether I wanted to plead guilty, there was substantial doubt expressed by me. For example, I denied that I did anything fraudulent (Minutes o plea, p. 16). When asked by the Court whether the entries were untrue, Mr. Cutler responded 'Unquestionably.' I responded 'I don't know. I don't know. I don't say unquestionably.' (Minutes, p. 17).

"Moreover, when asked whether or not there had been reliance on certain papers, I merely said 'They probably relied upon this paper.' (Minutes, p. 18)."

At the time of plea, the Trial Court indicated that certain conditions would be set for restitution and the like and that the Petitioner could have his plea back again in the event that the conditions could not be met (A94, 105-110, 115-123).

We informed the Trial Court that the conditions could not be met, and yet that Court refused to allow withdrawal of the plea. Thus, at page A91 of his affidavit in support of his motion to withdraw the plea, Kupferstein further alleged:

"Furthermore, the Court itself indicated that if, for some reason, the arrangements made in the plea bargain could not be carried out, that I would be entitled to have my plea back (Minutes, p. 22). That is what I would want because I not only maintain that I am innocent but, in addition, the restitution required is totally unrealistic.

"I have retained Mr. Anolik in connection with this case and I have relieved Mr. Cutler from this case.

"I am aware of the fact that I shall be required to go to trail, but this is what I want to do. In fact, I always wanted to go to trial, and still do.

"Since this application is being made well before the 3rd of August, which is the date set for my sentence at the present time, I submit that the District Attorney cannot be prejudiced in any way.

"I am entitled to my day in Court. I have never previously been convicted of any crime. I am a deeply religious man and I realize that what I am saying here is under oath and I tell you, under oath, that I am not guilty of the charges which were brought against me."

A perusal of the minutes of sentence will show that the Trial Court imposed a considerably less than five-year period for the defendant-petitioner to make restitution, despite his protestations that he could not do so, and that it was contrary to the plea minutes.

Yet, a perusal of the plea, page 28, reveals the following colloquy with the Trial Court, wherein the Court states that the defendant shall have five years within which to make restitution (A28-30):

"THE COURT: So, the essence of our disposing of this case is to dispose of it once and for all forever.

Do you know what I mean?

In other words, we are taking a plea here this afternoon to dispose of this case and to dispose of it forever. You make the payment, the People are satisfied, that is the end of the case. You do not come back here again. You are finished. It's over. The years this thing has been over your head will be completed, finished.

Now, in the event I put you on probation, it will be an extended period of time of probation, five years probation, where, one, you would have to pay the

money either before the expiration of this probation or up until the five years.

Do you understand that?

THE DEFENDANT KUPFERSTEIN. Yes."

At the hearing which was held prior to the imposition of sentence, wherein the issue of permitting withdrawal of the plea was probed by Judge Lodato, Murray Cutler, the Trial attorney for the Petitioner, testified for the prosecution that the defendant was "on the verge of hysteria" (p. 83) (A393).

At page 66 of the minutes Mr. Cutler testified that the defendant, prior to the plea and during allocution thereon, told him that "he's not guilty of anything but he's pleading guilty."

In addition, the Petitioner told Cutler, according to the latter's testimony, that he was "practically penniless" and that he "had no money" because "Landau [the co-defendant] had taken all the money."

Additionally, Cutler testified that the defendant was dejected and not very responsive (66) (A376).

Cutler recalls that at all times the defendant had a reluctance to plead guilty (59). Moreover, he stated that Cutler had been informed by Kupferstein that the latter was only an employee of Rabbi Landau, the co-defendant, and that he was not really involved in any wrongdoing whatsoever.

The attorney, Cutler, stated that because there were 124 counts against Kupferstein, he urged him to try to resolve the case by plea (59) (A369).

In addition, Cutler testified that the defendant was worn out and seemed to be very much "in a state of fear" (62) (A372).

At the proceedings prior to the plea, Cutler recalled the Trial Judge saying that the case "looks like a civil case" and Cutler informed Kupferstein of this sentiment, indicating that if he took a plea the Judge would probably be very lenient (75) (A385).

The attorney also testified that the fact that a client says guilty in a plea bargain, does not necessarily mean that he thinks he

really is guilty. He pointed out that is the way things are done during a plea bargain (80) (A390).

Furthermore, Cutler testified that he does not make it a practice of going into the questions or specifics of guilt. That is for the Court to determine (81) (A391).

On cross-examination Cutler admitted that up until the time of trial and the commencement thereof, Kupferstein consistently claimed he was innocent (86) (A396).

In addition, he stated that during the plea negotiation at the time of the plea itself, Kupferstein was very depressed and agitated and was in "an upset state of mind" (86, 87) (A396-7).

The lawyer testifying for the prosecution admitted that the case was a triable case, although the Court sustained an objection (87) (A397).

He repeated that he never had the defendant examined by a physician or a psychiatrist, despite the obvious depression and dejection which he exhibited and that Kupferstein on many occasions had told him that he was really innocent and wanted to vindicate himself (88) (A398).

In the minutes of November 23, 1981, Robert Baron, Esq., an attorney, testified that he had represented Kupferstein in certain civil matters in the past. He testified that in around May of 1981 he was informed by the appellant that the latter was on trial in a criminal proceeding but that he had lost confidence in his trial attorney [Murray Cutler, Esq.], and that he believed his attorney was perhaps better prepared to handle violent criminal cases rather than white-collar type cases.

Mr. Baron stated that he was then told that Mr. Kupferstein had pleaded guilty and was very disturbed about it, as a result of which he referred Kupferstein, after looking at the Grand Jury minutes himself, to another attorney (6-7) (A152-3).*

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* It should be noted that the hearing was extended over quite a period of time, so the pagination of various minutes are paginated as of the date that they were taken, and that is why there appears to be duplicate numbers of their different dates. But the appendix is in proper sequence.

At this point we interject the fact that over objection the Trial Hearing Judge permitted the prosecution to roam far and wide on its cross-examination ad its direct examination, concerning matters that had nothing to do with the issue of withdrawing the plea of guilty. That was a very narrow issue and could have been resolved perhaps in a matter of a day or two. Instead, the hearing lasted a number of days because the prosecution was permitted to roam into wholly irrelevant areas, such as is illustrated by the far-reaching and irrelevant cross-examination of attorney Baron. The Court permitted the prosecution to go into corporate structures, and whatnot.

At the hearing a motion in limine was made that the Court restrict any examination of the defendant-petitioner to the issue of withdrawal of his plea. Particularly in view of the fact that permission to withdraw his plea would entitle the petitioner to go to trial, it was highly prejudicial to permit the prosecution to go beyond the issue raised by the hearing. Despite this fact, the Court permitted extensive cross-examination of Kupferstein on every aspect of the case, most of which had nothing whatsoever to do with the withdrawal of the plea of guilty. (See Minutes of December 14, 1981, beginning at pages 1 through 10 [A244-255] and following).

The salient fact is that Kupferstein stated that he did not want to plead guilty; that he was innocent; and that he was cajoled and, in essence, frightened into pleading guilty, although he was never guilty.

The petitioner stated that he wrote letters to his then attorney, Murray Cutler, Esq., on two occasions, but received no responses, marked "Defendant's Exhibits A and B" (6-9) (A92, 93).

Petitioner testified further at this hearing that his attorney was not really prepared to go to trial because he did not have any in-depth, or even superficial, preparation.

Another letter was sent marked "Exhibit C." So far as preparation was concerned, the defendant-petitioner testified that Cutler told him that it wasn't really necessary to be prepared for trial. Cutler allegedly said "You don't have to do anything.

You will just sit there. You're innocent. You will sit there. The trial is for Landau . . . You're innocent. You just sit there. I will not ask you to be a witness."

Kupferstein further declared that he always maintained his innocence (12) (A254).

Furthermore, petitioner testified that he never authorized Mr. Cutler to arrange a plea of guilty for him (14).

He stated that after the trial had started and progressed for several days, Cutler asked "How about pleading guilty?" Kupferstein asserted that he responded "Forget about it. Don't even mention this kind of thing to me" (14, 15) (A256-7).

Kupferstein then related that Cutler told him the Judge was pressuring him because the case could be disposed of. But, he rejoined that he was no interested in it. He insisted that he was innocent and that he did not want to plead guilty (15).

Furthermore defendant stated that he was frightened and cajoled because he was informed that he would be sent to Riker's Island and that he was told "You cannot be with them [the inmates] even one hour or half-hour" (15, 16) (A257-8).

The petitioner further testified that he received constant pressure from this attorney time and time again, and he then began to feel that he was not really his lawyer and that he was not really interested in defending him. Under the circumstances, he felt completely deserted and then believed that he had no choice but to plead guilty because he had a lawyer who was not really interested in defending him (16) (A258).

He asserted that he spoke to other lawyers, a Mr. Baron, a Mr. Hessler, and a Mr. Selzer, and also a Mr. Bisar (17) (A259).

He told all these people that he had lost confidence in Mr. Cutler and that Mr. Cutler did not really want to defend him (17) (A259).

He stated that he was very frightened about Riker's Island and that he felt under a great deal of pressure (17, 18).

Moreover, defendant stated that the financial arrangements set forth in the plea discussions were totally impossible for him to afford (18) (A260).

Additionally, Kupferstein testified that he wants to have his plea of guilty withdrawn and wants to go to trial (18, 19) (A260-1).

There was other testimony adduced at the hearing, all indicating that the defendant-petitioner always claimed he was innocent and that even his former lawyer, Murray Cutler, had to concede that the defendant claimed he was innocent and that he was very upset, agitated and frightened, and during the plea discussions themselves, appeared to contest his guilt.

A perusal of the minutes of the plea furthermore reveal that petitioner did not give unequivocal answers of guilt, but, on the contrary, was very equivocal.

Another witness, Irving Heisler, testified for Mr. Kupferstein, stating that he, too, was an attorney at law and that he had contacted the then attorney representing Mr. Kupferstein, prior to the trial herein. Although he had left messages, Mr. Cutler did not return his calls for quite some time, namely March of 1981.

Mr. Heisler testified that there were certain matters that he felt Mr. Cutler had to know about in order to properly represent Mr. Kupferstein (Minutes 11/23/81, pp. 52-56) (A198-204).

Heisler testified that in speaking to Mr. Kupferstein he was informed that the latter had lost his confidence in Mr. Cutler and was convinced that Mr. Cutler could not properly represent him in this trial. Heisler asserted, however, that he was unable to recommend a substitute attorney on such short notice because the trial was imminent (see pages 54-57) (A200-203).

Again, over objection, the Court permitted the prosecution to go into vast irrelevant areas on cross-examination. The Court attempted to justify this on the basis that the question of restitution was involved and therefore the prosecutor had a right to go into the question of finances.

We submit, however, that the issue was incorrectly analyzed by the Court below, because restitution was irrelevant at that point since the defendant-petitioner was seeking to withdraw his plea altogether and go to trial.

It should be noted that Mr. Cutler himself had testified that the defendant appeared confused at the time that he pleaded guilty.

At the time of sentence the Trial Court was again reminded that the defendant protested his innocence and asserted that he did not intend to plead guilty, but was confused and was misadvised by his former attorney, Murray Cutler, Esq. The Court nevertheless denied the motion to withdraw the plea of guilty and undertook to impose sentence. The defendant stated that he was prepared to take a polygraph test, if necessary, but the prosecutor apparently would not consent (Minutes of 9/24/82, pp. 3-5) (A405-9).

It was pointed out that the defendant had never previously been in conflict with the law and that the defendant insisted that he was not guilty (6) (A254-6, A404-9).

At page 7 of the same minutes, the defendant, at the time of sentence, stated that he was not guilty, and that he didn't do anything wrong, and that he did not take money from anybody (7-8).

It was further pointed out at the time of sentence that the defendant did not have the wherewithal to make restitution and was not prepared to do so (9-11)* (A410-13).

On October 25, 1982, the Trial Court indicated that the restitution was not necessarily to be paid over a 5-year period because no schedule had been set. Yet, the minutes of plea clearly indicate, as we have demonstrated, *supra*, that the Trial Court stated that the defendant would be given five years within which to make restitution (Minutes of 10/25/82, pp. 10-12).

Petitioner's attorney, Mr. Cutler, made a written motion to dismiss the indictment for denial of a speedy trial, pointing out that the people delayed the trial but Kupferstein was *ready* at all times. The motion was denied.

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* As a matter of record, however, defendant has been making restitution by depositing monies in an escrow ccount, and the Court and prosecutor have been kept advised of this fact. At the present time, approximately $60,000 in restitution has been accumulated against the $200,000 due. This fact, however, is brought out because of the desire to demonstrate petitioner's good faith and in no way should be interpreted as diminishing his ardent desire to have the guilty plea and sentence vacated and being permitted to go to trial.

REASONS FOR GRANTING THE WRIT

POINT I

A PLEA OF GUILTY IS TANTAMOUNT TO A CONFESSION OF GUILT UTTERED IN OPEN COURT AND, THEREFORE, IMPACTS UPON THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. WHERE COUNSEL FOR A DEFENDANT IMPROPERLY INFLUENCES HIM TO PLEAD GUILTY, CONTRARY TO HIS WISHES, OR CAJOLES OR INTIMIDATES HIM INTO DOING THAT, WE MAINTAIN THAT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, IN DEROGATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IN THE CASE AT BAR, WE SUBMIT THAT BY KUPFERSTEIN'S TRIAL ATTORNEY'S OWN ADMISSION, HE URGED HIS CLIENT TO PLEAD GUILTY DESPITE THE FACT THAT PETITIONER MAINTAINED HIS INNOCENCE, AND FURTHER CONCEDED THAT PETITIONER SEEMED CONFUSED, FRIGHTENED, AND EQUIVOCAL.

While plea bargaining is one of the realities of the criminal justice system, and even the Supreme Court has said that properly administered it is to be encouraged, that certainly does not mean that it is to be foisted upon a defendant, contrary to his interests and wishes (See *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498).

It is axiomatic that a plea of guilty or *nolo contendere*, may be accepted if it is entered voluntarily. (*Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463; *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160).

Furthermore, it has been held that the decision to plead guilty or not guilty is a decision reserved solely for the accused, based upon his intelligent and voluntary choice. (*Wiley v. Sowders*, 6th Cir. 1981, 647 F.2d 642).

Moreover, it has been held that in determining whether a guilty plea was made knowingly, intelligently, and voluntarily, factors to be taken into consideration include the accused's age and background [in the case at bar the accused is a man of advanced age and has a foreign background and not accustomed specifically to the Anglo-Saxon system of justice as practiced in this country]; trial counsel's familiarity with the law; consistency or lack of consistency in pleas made throughout the pretrial and trial stages of the case [Kupferstein throughout, even by admission of his own trial lawyer, consistently claimed that he was innocent and wanted to be vindicated]; and the accused's opportunity to consult with trial counsel. (*United States ex rel. Wakely v. Russel*, D.C. Pa. 1970, 309 F.Supp. 68).

It should be noted here that the trial counsel, Mr. Cutler, conceded that the accused did not want to plead guilty; he seemed nervous and confused; and had always insisted upon his innocence.

It should be pointed out further that the accused produced a number of exhibits, as well as the testimony of other attorneys, that he immediately notified them that he had been forced to plead guilty and was extremely upset by the fact that his lawyer had intimidated him to the point of compelling him to plead guilty.

In *Heidman v. United States*, 8 Cir. 1960, 281 F.2d 805, it was held that a plea of guilty is not voluntary simply because it is the product of sentient choice, but is involuntary if, though it involves a choice, is the result of duress.

Furthermore, it has been held that where the prosecutor has made a promise, as was done herein, namely that a list of creditors who claimed the petitioner owed them money would be supplied to him, and concededly that promise has not been kept, that, therefore, that would be a ground for vacating the plea of guilty (*Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621; and *Lepera v. United States*, 9 Cir. 1978, 587 F.2d 433, 436, n.4).

Furthermore, the prosecutor's failure to fulfill a plea bargain promise, or to make proper promises, is not rendered harmless

by the Court's refusal to follow the recommendation and the Court's awareness of impropriety, since a waiver incident to a plea is not given in exchange for actual sentence or the impact on the Judge, but for the prosecutor's statements in Court, and if they are not adequate, waiver is ineffective (*Correale v. United States*, 1 Cir. 1973, 479 F.2d 944).

A sentence based upon a guilty plea induced by reliance on an unfulfilled prosecution promise is void (*United States v. McCarthy*, 1 Cir. 1970, 433 F.2d 591).

In addition, it should be noted that he minutes of plea clearly reveal that the Judge indicated to the petitioner that he would have up to five years to make restitution of $200,000.00. Yet, the Judge, at the time of sentence, indicated that restitution would have to be made over a 2 year period, later extended to about 3 years. In any event, it was clearly in violation of the promise given during the plea, and the state of mind of the defendant when he took the plea (see *Santobello v. New York*, supra, and *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709).

In addition, it has been held as a corollary that no plea of guilty is voluntary if entered on advice of counsel, that fails to meet the minimum standards of effectiveness derived from the Sixth Amendment (*McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449; *Trahan v. Estelle*, 5 Cir. 1977, 544 F.2d 1305, 1309; *Johnson v. United States*, 9 Cir. 1976, 539 F.2d 1241, 1243, cert. den. 431 U.S. 918, 97 S.Ct. 2182; *United States v. Scott*, 5 Cir. 1980, 625 F.2d 623).

Furthermore, in *Strader v. Garrison*, 4 Cir. 1979, 611 F.2d 61, the Court of Appeals held that a conviction must be vacated where it appears that a guilty plea would never have been attended if defendant had been properly advised.

In *United States v. Crook*, 5 Cir. 1979, 607 F.2d 670, the Court held that when a defendant proposes to plead guilty, the duty of defense counsel is to make certain that the plea is entered voluntarily and knowingly.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT-PETITIONER'S MOTION TO WITHDRAW HIS PLEA OF GUILTY AND GO TO TRIAL. DURING A HEARING HELD ON THE MOTION TO WITHDRAW THE PLEA, NOT ONLY DID DEFENDANT STATE THAT HE WAS INNOCENT AND HAD NOT WANTED TO PLEAD GUILTY, BUT HIS OWN TRIAL LAWYER TESTIFIED THAT THE DEFENDANT WAS IN A STATE OF HYSTERIA AND PROBABLY CONFUSED BY WHAT WAS GOING ON.

The petitioner and one Rabbi Landau had been indicted on about 124 counts, in Kings County, in connection with certain real estate and related transactions. Landau was unquestionably the main culprit, whereas the petitioner herein was described as a person in Landau's employ. The petitioner, however, maintained that he was merely a functionary and performed solely ministerial tasks, and therefore was not involved in any criminality whatsoever.

The defendant insisted upon going to trial and, as a matter of fact, wrote several letters to his then attorney, Murray Cutler, Esq., complaining about the delay and so forth.

After the trial had progressed about two weeks or so, there was a colloquy at the bench, as a result of which a proffer to plead guilty to one of the counts of the indictment was made.

Landau pleaded guilty, and the petitioner herein likewise pleaded guilty. During the colloquy between the Court and the petitioner, however, it is obvious, as we have indicated in the Statement of The Case, supra, that petitioner was not responding unequivocally to the Court's inquiries as to whether or not he was guilty and seemed to be injecting reservations into his proffered plea.

Shortly after the plea was made, Kupferstein hired new counsel and moved to withdraw the plea of guilty, stating, among other things, that he was innocent, that he had been

cajoled into pleading guilty, and that he wanted to go to trial and that he had never really intended to plead guilty.

The defendant-petitioner produced certain witnesses, including his own trial attorney as well as other attorneys, indicating that he at all times had wanted to go to trial and had consistently protested his innocence. His trial lawyer, Murray Cutler, Esq., testified for the prosecution that the petitioner had always told him he was innocent and wanted to go to trial and that it was quite possible that at the time of the plea that petitioner was confused and it was unquestionable that he was also in a state of hysteria.

Other attorneys, such as Mr. Baron and Mr. Hessler, to say nothing of the defendant himself, testified that he was very dissatisfied with the work of his trial attorney, Mr. Cutler, and had expressed these fears to these attorneys. He had not changed attorneys. He had not changed attorneys at that time because the imminence of trial was of such a nature that it would be impossible to get new counsel before trial.

The Court, unfortunately, let the hearing to withdraw the plea degenerate into an excursion by the prosecutor to all facets of the case, and well beyond. The Court permitted the prosecutors to explore the defendant's and his wife's financial conditions, many facts concerning real estate operations, and zeroed in very little upon his state of mind as to when he pleaded guilty. We maintain the issue was whether or not the defendant pleaded guilty knowingly, intentionally, and voluntarily, and what his state of mind was at that time.

It was highly prejudicial and improper, we maintain, to have permitted the prosecutor to go so far afield. The Court really did not get down to the so-called "nitty gritty" of the issue whether or not the defendant's state of mind was such that he willfully, knowingly, and intentionally, as well as voluntarily, pleaded guilty.

Shorn of its circumlocutory prolixities, the nub of the record clearly reveals, without contradiction, that the defendant-petitioner did not want to plead guilty and did not do so voluntarily and intentionally.

This is borne out not only by Kupferstein's testimony, but by that of his own attorney as well.

In *People v. Granello*, 18 N.Y.2d 823, the Court of Appeals made it quite clear that in dealing with the issue of the withdrawal of a plea of guilty, it is not sufficient for the Trial Court to note that the defendant did not indicate any reservations when he answered the stereotyped questioning that takes place during such a plea. The fact that denials as to promises or misunderstandings are made, the Court of Appeals said, are not conclusive that they in fact were not made.

In the case at bar, however, the colloquy itself reveals strong reservations and confusion on the part of the petitioner. Thus, we maintain that the petitioner's statements at the time of the colloquy during the plea of guilty are insufficient to warrant denial of the relief of withdrawing his plea of guilty.

In *Hunter v. Fogg*, 470 F.Supp. 1041 (D.C. N.Y., 1979), rev'd on other grounds, 616 F.2d 55, the Court held that the defendant's pro forma acknowledgement that he understood the sentencing scope and that there were no off-the-record promises about sentence, were not necessarily controlling. The Court indicated that where defendant seeks to withdraw the plea of guilty on the grounds of a misunderstanding as to the sentencing possibilities, there must be careful review nevertheless made.

In the case at bar, one of the conditions of the plea was that petitioner return or refund $200,000 in restitution. Petitioner stated that his agreement to that condition was ridiculous because he doesn't have anywhere near such fund, and could not possibly have been expected to make such restitution. We maintain that is another indicia of the absurdity of the plea.

On top of this, at the time of sentence the Court imposed a very short schedule for payment of the $200,000, ignoring the colloquy at the time of plea that petitioner would have five year within which to refund money.

Thus in the *Fogg* case, supra, the Court noted that there is a basis for withdrawal of such a plea.

See also, *People v. Twiggs*, 58 A.D.2d 726, 369 N.Y.S. 2d 277; *People v. Moore* (4th Dept.), 78 A.D.2d 997, 433 N.Y.S.2d

689; and *People v. Rogers* (1981, 1st Dept.), 81 A.D.2d 564, 438 N.Y.S.2d 338.

In *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, cert. den. 419 U.S. 1122, the Court of Appeals noted, in this leading case, that plea negotiations serve laudable purposes.

Significantly, at page 235 of 35 N.Y.2d, 630 of 360 N.Y.S.2d, the opinion in *Selikoff* explains:

> "Where a defendant denies guilt, or if the court believes defendant may be innocent, and the guilty plea is not otherwise justified as knowing and intelligently made, the guilty plea may be and should be rejected citing cases."

In the case at bar, it is significant that the defendant has denied his guilt on several occasions, and, indeed, his own trial counsel, Murray Cutler, Esq., during the hearing as to whether the guilty plea should be with withdrawn, conceded that at all times his client insisted that he was not guilty and wanted to go to trial.

Since a defendant is entitled to go to trial if he in fact is not guilty and asserts that he did not intelligently and knowingly waive trial by pleading guilty, it is obvious that he should be permitted to have his plea back and go to trial. (see, e.g., *People v. Beasley*, 25 N.Y.2d 483, 307 N.Y.S.2d 39; *People v. Nixon*, 21 N.Y.2d 338, 351, 287 N.Y.S.2d 659, 668; *People v. Serrano*, 15 N.Y.2d 304, 258 N.Y.S.2d 386; and *North Carolina v. Alford*, 400 U.S. 25, 31-39, 27 L.Ed.2d 162).

In the case at bar as well, a perusal of the minutes of the sentence itself will reveal that the Court set a much lesser time for repayment of the $200,000 restitution than that promised in the plea negotiations.

In other words, whereas at the time of plea the Trial Court indicated that Kupferstein would have five (5) years within which to repay the funds, at the time of sentencing he indicated the time would be considerably less, and did not seem to recall the promise.

Irrespective of that fact, which we believe in itself would warrant withdrawing the plea, Kupferstein has consistently maintained that he did not intentionally plead guilty; that he was confused and near hysteria at the time, and that he is innocent, so we submit that he should be given the right to go to trial.

POINT III

THE PETITIONER WAS DENIED A SPEEDY TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In addition to the foregoing, the petitioner in the court below had made a complaint to his own attorney, as well as to the Court, that he was being denied speedy justice in violation of his Constitutional rights under the Federal Constitution.

We maintain that this case, in the Trial Court, languished for a very protracted period of time without being brought to trial. A written motion by Petitioner's trial counsel to dismiss for want of a speedy trial was denied. Petitioner was always ready.

Mr. Kupferstein, the petitioner herein, had written, as well as orally complained to this trial attorney about the inordinate delay in bringing his case to trial. He was forced to suffer the obliquy and disgrace of criminal charges without any opportunity to redress them, until finally the case was brought before the Court.

We maintain that under the circumstances, this was a gross violation of his right to a speedy trial.

See *Klopper v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988; *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564; *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182; *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455; *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303; and, *Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260.

Under the circumstances, we maintain that a grant of the certiorari is warranted for this reason as well.

CONCLUSION

The petition for certiorari should be granted and the relief requested should be ordered, to wit, a vacating of the orders of the Appellate Division and the judgment of the Supreme Court, Kings County.

Respectfully submitted,

IRVING ANOLIK
A Member of the bar of this Court
Attorney for Petitioner.

APPENDIX

CERTIFICATE DENYING LEAVE

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

BERNAT KUPFERSTEIN

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record the proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
June 1, 1984

Associate Judge

* Description of Order: Judgment of Supreme Court, Kings, September 24, 1982; affirmed by Appellate Division, Second Department, April 9, 1984.

APPENDIX B
B-1

OPINION OF
APPELLATE DIVISION: SECOND DEPARTMENT

GUY J. MANGANO, J.P.
DAVID T. GIBBONS
MOSES M. WEINSTEIN
JAMES F. NIEHOFF, JJ.

_____AD2d_____ A - March 13, 1984

1886 E The People, etc., respondent, v Bernat Kupferstein, appellant. (Ind. No. 4129/77)

Irving Anolik, New York, N.Y., for appellant.

Elizabeth Holtzman, District Attorney, Brooklyn, N.Y. (Barbara D. Underwood, Michael Gore and Janet M. Berk of counsel), for respondent.

Judgment of the Supreme Court, Kings County (LODATO, J.), rendered September 24, 1982, affirmed. No opinion.

MANGANO, J.P., GIBBONS, WEINSTEIN and NIEHOFF, JJ., concur.

April 9, 1984 PEOPLE v KUPFERSTEIN, BERNAT 1886 E

APPENDIX C
C-1

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 9, 1984

HON. GUY J. MANGANO, Jutice Presiding,
HON. DAVID T. GIBBONS,
HON. MOSES M. WEINSTEIN, *Associate Judges*
HON. JAMES F. NIEHOFF.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

v.

BERNAT KUFPERSTEIN,

Appellant,

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Bernat Kupferstein, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered September 24, 1982; and the said appeal having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Janet M. Berk, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is: ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter: s/ Irving N. Selkin
Clerk of the Appellate Division

Office-Supreme Court, U.S.
FILED
SEP 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-100

IN THE

Supreme Court of the United States

October Term, 1984

BERNAT KUPFERSTEIN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

ELIZABETH HOLTZMAN
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* Counsel of Record

BEST AVAILABLE COPY

Questions Presented

1. Whether defendant's failure to alert the state court to the federal nature of his claims precludes certiorari review by this Court.

2. Whether the state trial court properly denied defendant's motion to withdraw his guilty plea where based upon the record of a full evidentiary hearing it found, that with advice of competent counsel, defendant had waived his constitutional rights, admitted his guilt, and pled guilty with full knowledge of the consequences.

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No. 84-100

IN THE

Supreme Court of the United States

October Term, 1984

BERNAT KUPFERSTEIN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the judgment of the Appellate Division of the New York State Supreme Court, Second Department, in this case. That judgment was not accompanied by an opinion. It is reported at 100 A.D.2d 983, 473 N.Y.S.2d 898 (2nd Dept. 1984).

Opinions Below

The judgment of conviction was affirmed without opinion in the court below. *People v. Kupferstein*, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2nd Dept. 1984). Leave to appeal was denied by an Associate Judge of the New York Court of Appeals on June 1, 1984. (Wachtler, J.). —— N.Y.2d —— (1984).

Jurisdiction

The judgment of the Appellate Division of the New York State Supreme Court, Second Department was entered on April 9, 1984, affirming defendant's judgment of conviction, dated September 24, 1982. Leave to appeal to the Court of Appeals was denied on June 1, 1984. The petition for certiorari was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257.[1]

Statement of the Case

Introduction

Defendant Bernat Kupferstein was convicted, after a plea of guilty, of Falsifying Business Records in the First Degree [New York Penal Law § 170.10]. The plea was entered in New York State Supreme Court, Kings County, in satisfaction of a 124 count indictment charging defendant with grand larceny, forgery, falsifying business records, and violations of the New York General Business Law. These charges arose out of numerous illegal real estate transactions occurring over a 15-year period and involving millions of dollars.

Defendant was sentenced on October 25, 1982 to five years probation, $200,000 restitution, and $2,400 to be paid to the District Attorney's office for trial expenses. The conviction was affirmed by the Appellate Division, Second Department, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dept. 1984), and leave to appeal to the Court of Appeals was denied, —— N.Y.2d ——, —— N.Y.S.2d —— (1984).

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[1] Defendant also incorrectly invokes jurisdiction under U.S.C. § 1254, which applies to review of a decision of a federal court of appeals.

Defendant is currently on probation and has paid $70,000 of his court ordered restitution to an escrow account.

The Plea

On April 28, 1981, defendant waived a jury and proceeded to trial, along with his co-defendant, Ferdinand Landau. After two weeks of testimony, involving hundreds of exhibits, defendant and Landau indicated that they wished to plead guilty.[2]

On May 12, 1981, on the advice of counsel, defendant entered a plea of guilty to one count of Falsifying Business Records in the First Degree in full satisfaction of the indictment (A. 95-96).[3] Defendant stated that he had ample opportunity to discuss the case with his attorney, and that he was pleading guilty because he was in fact guilty (A. 96).

The court explained that by pleading guilty defendant was confessing his guilt and waiving his right to continue the trial (A. 97). The court advised defendant that he was not obligated to incriminate himself, and that he had the right to continue the trial, to cross-examine witnesses and to controvert the evidence against him (A. 97-98). Defendant confirmed that he understood these rights and that his attorney had discussed them with him (A. 98). Defendant acknowledged that he was entering the plea voluntarily, that he had not been promised anything in

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[2] Landau was also convicted, on a plea of guilty, of Falsifying Business Records in the First Degree [New York Penal Law § 170.10]. He never sought to withdraw his plea and never appealed his conviction.

[3] Numbers in parentheses preceded by the letter "A" refer to page numbers of Defendant's Appendix used in the court below. Numbers in parentheses preceded by the letter "B" refer to page numbers of Respondent's Appendix used in the court below.

return for his plea, and that he was not currently under the care of a physician or taking any medication (A. 96-98).

Defendant admitted that during the period of February 5, 1963, through April 1976 he participated in a real estate arrangement whereby he agreed to be a contributing partner of Parkview of Hempstead Associates (A. 99-100). Towards that end, he signed an instrument stating that he had contributed $10,000 to the enterprise when, in fact, he had not contributed any money (A. 100-109). His intent in making the false entry was to make money for himself at the expense of the other partners (A. 101). Over the years, the other partners apparently relied on defendant's false contribution statement and defendant received profits from the real estate transactions (A. 107-11).

The court indicated that it would probably impose a sentence of five years probation (A. 119-20), and as a condition of probation it would require restitution in the amount of $200,000 to the victims plus $2,400 to be paid to the Office of the District Attorney (A. 119, 139). The court would require the defendant to pay $80,000 on or before the sentence date (A. 116), and the balance within four or five years, on a payment schedule to be determined at the time of sentence (A. 119). If the court decided it could not keep its promise, then it would allow defendant to withdraw his plea (A. 115).

Defendant acknowledged that he understood the conditions of the plea, and that he took the plea in order to dispose of the case once and for all (A. 116-21).

Motion and Hearing to Withdraw the Plea

In an affidavit dated June 24, 1981, defendant moved to withdraw his plea. He claimed that he was innocent of all crimes, but had pled guilty because his attorney had

coerced him (A. 89-91). The court ordered a hearing to determine defendant's claim.

The Evidence in Support of the Motion

Defendant testified that he had retained Mr. Murray Cutler to represent him in this case in 1978 (Kupferstein: A. 248). Prior to trial defendant wrote to Mr. Cutler about his case, but received no letters in response (Kupferstein: A. 250-53). He did speak with Mr. Cutler about the case before trial (Kupferstein: A. 254). After the trial began, Mr. Cutler asked defendant if he wanted to plead guilty, but defendant said no (Kupferstein: A. 256). When Landau decided to plead guilty, Mr. Cutler put pressure on defendant to do so (Kupferstein: A. 257). Defendant felt he had no choice but to plead guilty (Kupferstein: A. 257).

At this point defendant consulted two other attorneys, ROBERT BARON and IRVING HEISLER, who advised him not to change attorneys in the middle of trial (Kupferstein, Baron, Heisler). Defendant felt that if he did not plea guilty, Mr. Cutler would not properly defend him (Kupferstein: A. 259). In addition, Mr. Cutler frightened defendant into thinking that he might go to jail if he did not take the plea (Kupferstein: A. 259-260). He decided to take the plea and to appeal later (Kupferstein: A. 259).

Defendant claimed that he was innocent because he only carried out the ministerial functions that Landau had ordered him to perform (A. 245). Defendant admitted that the Parkview Associates partnership agreement accurately represented his false statement that he had contributed $10,000 of capital towards the purchase price of the property (B. 29-30).[4]

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[4] Defendant claimed that by a separate agreement, Landau had owed him $10,000 as a finder's fee and for management of the property. Landau then converted this debt to shares in the partnership (B. 30-33).

The Evidence in Opposition to the Motion

Attorney Murray Cutler represented defendant during the three-year course of the case (Cutler: 366). He made numerous court appearances, filed motions, and communicated with defendant on many occasions (Cutler: A. 366-67).

At the beginning of the case, Mr. Cutler told defendant that the prosecutor had offered a plea. If defendant admitted his guilt, he would have to go to jail for ninety days and would have to pay $1,000,000 restitution (Cutler: A. 368). Defendants did not want to plead guilty because be believed that he was not culpable (Cutler: A. 368). Defendant claimed that Landau had masterminded the scheme and that he had just followed orders (Cutler: A. 383). Mr. Cutler explained to defendant that he was culpable even though his role in the fraud had been less important that Landau's role (Cutler: A. 383). Mr. Cutler also made defendant aware of the consequences of going to trial on a one hundred and twenty-four count indictment. (Cutler: A. 369).

After two weeks of the trial, Landau decided to plead guilty (Cutler: A. 370). Mr. Cutler and defendant discussed all of defendant's options and the consequences of entering a guilty plea. Mr. Cutler advised defendant that it was in his best interest to disposed of the case rather than to continue with the trial, because, if he were convicted, petitioner faced a possible jail term (Cutler: A. 369-70). While defendant was unhappy about the prospect of admitting his guilt, he seemed to understand all the options (Cutler: A. 370, 394).[5]

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[5] Mr. Cutler testified that defendant appeared upset when he entered his plea (Cutler: A. 393). The court found that defendant was not in a state of anxiety when he pled guilty (A. 397).

Once defendant decided to plead guilty, his main concern was to pay as little restitution as possible. (Cutler: A. 378-79).

The Order and Findings of the Court

In a decision dated July 19, 1982, the court denied defendant's motion to withdraw his plea. (B. 75).

The court found that Mr. Cutler was an experienced criminal attorney who had effectively represented petitioner over the three-year course of the proceedings (B. 70, 74). Mr. Cutler had appeared in court on this matter over thirty times. He had made discovery motions, and, at defendant's request, had moved to dismiss the indictment in the interest of justice and on the ground that defendant had been denied his right to a speedy trial (B. 70). Moreover, prior to the plea Mr. Cutler had participated in nearly two weeks of the trial which involved over 500 exhibits (B. 71).

During the first weeks of the trial, defendant became increasingly apprehensive and nervous as the trial progressed (B. 71). When Landau pled guilty, Mr. Cutler advised defendant that it was in his best interest to do the same (B. 71).

On May 12, 1981 defendant did plead guilty (B. 71). At that time the court advised defendant of all his constitutional rights, and defendant acknowledged that he understood them (B. 72-3). Defendant admitted his guilt (B. 71-2). At no time did defendant claim innocence, nor did he ever indicate that Mr. Cutler had forced him to take the plea (B. 71). Indeed, defendant, who is an intelligent businessman, understood all of his options and knew just what he was doing when he pled guilty (B. 74).

The court found that defendant had unequivocally asserted that he would pay $200,000 restitution (B. 74).

There was no change of circumstances which would keep him from meeting that obligation (B. 74).

The Sentence

Defendant was sentenced on October 25, 1982, to five years probation and to make restitution of $200,000 plus $2,400 to be paid to the office of the District Attorney for expenses incurred during trial before defendant pled guilty (A. 414-415). Defendant was ordered to pay an initial $40,000 on the date of sentence, plus $40,000 every three months beginning January 15, 1983 (B. 63).

The State Appeal

In his brief to the New York State Supreme Court Appellate Division, Second Department and in his letter requesting leave to appeal to the New York Court of Appeals defendant raised two issues: That he was denied his state statutory speedy trial rights, and that the court should have permitted him to withdraw his plea of guilty. In support of the latter claim, he never cited the United States Constitution. He cited only two federal cases, *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Hunter v. Fogg*, 470 F. Supp. 1041 (S.D.N.Y. 1979). In this petition for certiorari he raises for the first time the claims that he was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, and that the plea was involuntary in violation of the Fifth Amendment to the United States Constitution. He also claims that he was denied a speedy trial in violation of the Sixth Amendment to the United States Constitution.

Reasons Why The Writ Should Be Denied

1. Defendant Never Properly Presented His Federal Claims to the State Courts.

Defendant never asserted in any state court that he was denied his Sixth Amendment right to effective assistance of counsel, or that his plea was unconstitutionally coerced or involuntary. Instead he claimed only that the trial court committed error in denying his motion to withdraw his plea. That claim did not alert the state courts to any federal constitutional claim. Defendant framed his speedy trial claim in federal constitutional as well as state statutory terms in the trial court, but abandoned the federal claim in his state court appeal. Having failed to present these federal claims to the state courts, there was never a state court adjudication of them. Thus, this Court's jurisdiction to correct a state court judgment that incorrectly adjudicated federal rights has not been properly invoked. *Webb v. Webb*, 451 U.S. 493 (1981); *Ellis v. Dixon*, 439 U.S. 458 (1955); *Whitney v. California*, 274 U.S. 357 (1928).

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question has been properly raised in the state court proceedings. In determining whether a question was "specifically set upon or claimed" within the meaning of U.S.C. § 1257(3), it is relevant and usually sufficient to ask whether defendant satisfied the state rules governing presentation of issues. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). In New York, a post conviction claim of ineffective assistance of counsel may be asserted pursuant to New York Criminal Procedure Law § 440.10. *People v. Brown*, 45 N.Y.2d 852, 854, 410 N.Y.S.2d 287, 382 N.E.2d 1149, 1150 (1978). Defendant never made such a claim in the state courts.[6] Further, on appeal to the

[6] Defendant's collateral attack on his guilty plea pursuant to Criminal Procedure Law § 440.10 claimed that the plea was in-

[Footnote continued on following page]

New York State Supreme Court, Appellate Division, Second Department and in his letter requesting leave to appeal to the New York Court of Appeals defendant failed to claim ineffective assistance of counsel.

Similarly, defendant's assertion that his federal constitutional right to a speedy trial was violated was never pursued on appeal. The fact that a federal question was properly raised before the trial court is not sufficient to bring the issue before this Court. The question must also be pursued on appeal, thereby giving the highest state court an opportunity to rule on the federal question. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). Petitioner failed to properly present his federal speedy trial question to the intermediate or highest state appellate courts and is therefore precluded from doing so at this late date.[7]

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voluntary in part due to the actions of counsel. While never specifically claiming ineffective assistance of counsel the hearing on the collateral attack necessarily presented the court with all the testimony relevant to such a claim. The court obviously found petitioner's testimony incredible as it denied petitioner's application to withdraw the plea.

In any event, the record clearly demonstrates that counsel, an experienced trial attorney, appeared in court over 30 times. Counsel filed all appropriate discovery motions and two motions to dismiss the indictment. Defendant and counsel communicated frequently about the case and complete advice was given on the benefits and detriments of pleading guilty. Nothing in the record indicates that counsel supplied any misinformation to petitioner.

The prosecution's initial plea offer included 90 days incarceration and $400,000 restitution. Defendant's sentence on the plea was probation and $200,000 restitution. Considering the potential liability of four years incarceration and the strong evidence of guilt it can hardly be said that the actions of counsel rendered an unjust result. *See Strickland v. Washington*, — U.S. — (1983).

[7] On appeal defendant made a bare allegation of a state statutory speedy trial claim and in no way alerted the court to his federal claim. *See Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982).

2. Neither Defendant's Claim Of Innocence Nor His Challenge To The Voluntariness Of His Guilty Plea Raises A Substantial Federal Question.

Defendant treats the petition to this Court as though it were simply another appeal to a court with plenary jurisdiction over all issues raised below. It is well settled that a guilty plea may not be sustained if involuntarily rendered, *Brady v. United States*, 397 U.S. 742 (1970), the result of promises not kept, *Santobello v. New York*, 404 U.S. 257 (1971), or not knowingly and intelligently made, *Boykin v. Alabama*, 395 U.S. 238 (1969), *North Carolina v. Alford*, 400 U.S. 25 (1970). Defendant litigated these issues below and simply seeks to relitigate them before this Court.

When defendant sought to withdraw his guilty plea the trial court provided him with a full evidentiary hearing on his claim, thus affording him full due process. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Machibroda v. United States*, 368 U.S. 487 (1962). The record amply supports the trial court's finding that he was an intelligent businessman who was adequately represented by a knowledgeable and experienced attorney. Defendant knowingly waived his constitutional rights and pled guilty with full knowledge of the consequences. He was fully aware of the charges against him and without equivocation recited his own culpable conduct to each element of Falsifying Business Records in the First Degree, one of the 124 counts in the indictment. The court found no merit in defendant's claim that he had relied on certain unfulfilled promises regarding the amount and payment schedule of restitution. The standards employed by the court were those enunciated in *People v. Miller*, 42 N.Y.2d 946, 398 N.Y.S.2d 133, 367 N.E. 640 (1977), and guaranteed that the plea represented a "voluntary and intelligent choice among the alternative courses of action open to defendant"

as mandated by federal law. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); *Boykin v. Alabama*, 395 U.S. 238 (1969). The trial court recognized that assertions of innocence are significant in determining whether a plea may be withdrawn, but it found defendant's assertions irrelevant and incredible. Essentially defendant's claim of innocence was based upon a belief that he could not be criminally culpable for actions made on behalf of his co-defendant employer. This legal theory was incorrect. Thus, as a factual matter, defendant did not effectively deny his culpability and there was no reason to permit him to withdraw his plea. *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975), *cert. denied*, 421 U.S. 1013 (1975).[8]

Absent a constitutional violation, if the advantages of plea bargaining are to be secured they must be accorded a great measure of finality. *Blackledge v. Allison*, 431 U.S. 63, 72 (1977). Further, this Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). This petition raises only factual issues, of interest to petitioner only, in well settled areas of the law. The petition points out no constitutional error in the court below. The record demonstrates strong evidence of guilt and raises nothing worthy of this Court's review.

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[8] It is well settled that even where contemporaneous with a guilty plea a defendant claims innocence, the plea may nonetheless be accepted if there is strong evidence of guilt. *North Carolina v. Alford*, 400 U.S. 25 (1970); *United States ex rel. Dunn v. Casscles*, 494 F.2d 397 (2d Cir. 1974). In the instant case the guilty plea came two weeks and 500 exhibits into the trial. In addition, defendant confessed to each element of the crime at the plea hearing. The record as a whole demonstrates the strong evidence of guilt that was before the court when it accepted the plea.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Brooklyn, New York
September 17, 1984

Respectfully submitted,

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